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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,

Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS;
and THEODORE W. GRAHAM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether due process in a fee sanction case under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), requires: (a) specification of charges and advance notice of hearing prior to any consideration of sanctions, (b) bifurcation of the sanction hearing from any hearing on the merits in the case in chief, and (c) opportunity at the sanction hearing to call favorable witnesses and to confront and cross-examine adverse witnesses, *before* the District Court may recommend the disbarment of an attorney in an opinion earmarked for publication or impose monetary sanctions against the attorney in an amount exceeding $36,000.

2. Whether a *Roadway Express* fee sanction in an amount exceeding $36,000 for filing a motion to reopen a bankruptcy case is sufficiently tantamount to a tort judgment for malicious prosecution or abuse of process to warrant the Seventh Amendment safeguard of trial by jury.

3. Whether the assessment of a punitive fee sanction against an attorney for an alleged abuse of process, "bordering on attempted fraud upon the Court," is so functionally indistinguishable from a fine for criminal contempt as to necessitate trial by jury under the Sixth Amendment when the amount of the penalty exceeds $36,000.

4. Whether district judges have discretionary power under Rule 7 of the Federal Rules of Appellate Procedure to deter or obstruct appeals from their own decisions by imposing exaggerated cost bond assessments which bear no reasonable relationship to actual costs and which exceed an appellant's financial resources, or whether 28 U.S.C. § 47 compels a narrower reading of Rule 7 and confines the district judge's discretion to the setting of a bond amount which approximates as closely as possible the actual costs that would be taxable in the appellee's favor if the appeal fails.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Michael Kaye respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 18, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California is reported *sub nom. Matter of Shen* at 7 Bankr. 942 (S.D. Cal. 1980). The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 18, 1982. A timely petition for rehearing was denied on February 24, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

United States Constitution:

Fifth Amendment

> No person shall be . . . deprived of . . . liberty, or property, without due process of law. . . .

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . .

Seventh Amendment

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

United States Code, Title 28

§ 47. Disqualification of Trial Judge to Hear Appeal

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

§ 1927. Counsel's Liability for Excessive Costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Rules of Appellate Procedure

Rule 7. Bond for Costs on Appeal in Civil Cases

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. . . .

STATEMENT OF THE CASE

Petitioner represented former debtors Samuel Shen and Carolyn Shen in a Chapter XII bankruptcy proceeding. Respondent Theodore W. Graham was trustee of the Shen estate. Luce, Forward, Hamilton & Scripps was the trustee's counsel.

Petitioner filed a motion on behalf of the Shens to reopen their case for certain limited and specified purposes. The jurisdiction of the U.S. District Court to consider such a motion was based on 28 U.S.C. § 1334, Section 2(a)(8) of the pre-reform Bankruptcy Act [former 11 U.S.C. § 11(a)(8)], and Bankruptcy Rule 515.

The major purposes of reopening were: (1) to obtain a turnover order to compel Graham and Luce Forward to relinquish the books and records of the Shen estate, which the Shens needed for effective post-bankruptcy administration of their properties, (2) to set aside a release by which the Shens had given up their right to question Graham's and Luce

Forward's conduct in handling the estate, and (3) to surcharge Graham and Luce Forward for multiple breaches of fiduciary duty, including unconsented-to conflicts of interest in which they had acted to benefit secret clients of the Luce Forward firm to the detriment of the Shen estate. [*See* 1 *Excerpt of Record* 1-128 and 222-237; 6 *Excerpt of Record* 1788-1795 and 1811-1843.]

Luce Forward filed more than 1500 pages of memoranda, declarations, and exhibits in opposition to reopening the case. Its exhibits alone occupy the entirety of Volumes Two through Five of the record. [*See also* 1 *Excerpt of Record* 129-221; and 6 *Excerpt of Record* 1704-1714, 1743-1787, and 1807-1810.]

The hearing took place on July 7, 1980. At the outset, both the court clerk and the district judge specified that the purpose of the proceeding was to hear the debtors' motion. The court confined each side to 30 minutes of oral argument. [*See* R.T. 3:1-14 (July 7, 1980).]

At the conclusion of petitioner's presentation, counsel for Graham and Luce Forward stepped up and made an oral motion for attorney fee sanctions. He immediately submitted declarations requesting costs and attorney fees in the total amount of $36,339.29. Petitioner had already fully exhausted his oral argument time and was given no opportunity to respond. The declarations had not been served in advance. Petitioner had no opportunity to study them while oral argument was still in progress. [*See* R.T. 23:15 - 25:4 (July 7, 1980); and 6 *Excerpt of Record* 1796-1806.]

The oral motion for sanctions had not been preceded by any written notice of motion, notice of cross-motion, or order to show cause. The court itself had not made any reference to sanction proceedings in its own notice of hearing [6 *Excerpt of Record* 1742] or at the outset of oral argument [R.T. 3:1-14 (July 7, 1980)].

In their papers opposing the motion to reopen, Graham and Luce Forward had stated that they would seek sanctions by means of a bill of

costs procedure. [*See* 1 *Excerpt of Record* 129, 165:21-22.] Under *Local Rule* 265-1 of the U.S. District Court, Southern District of California, the bill of costs procedure comes only after judgment. The application must be preceded by written notice and accompanied by an itemized bill of costs. [*See also* 28 U.S.C. § 1924, requiring itemization and verification of any bill of costs.]

Luce Forward did not wait until judgment. It did not give advance written notice of its application. It did not itemize, document, or describe any part of its purported costs. It did not state the customary billing rates of its in-house counsel, nor did it give any breakdown of hours or description of services for its claimed in-house legal work. [*See* 6 *Excerpt of Record* 1796-1800.]

Luce Forward's outside counsel did partially document a fee claim in the amount of $4,470 and a claim for disbursements in the amount of $7.65. [*See* 6 *Excerpt of Record* 1801-1806.]

Petitioner had attended the July 7, 1980 hearing prepared to argue the merits of the Shens' motion to reopen, not to deal with unnoticed sanction proceedings. In any event, Luce Forward prevented response by withholding its oral motion for sanctions until after petitioner had used up his allotment of time.

Petitioner could not have raised personal defenses even if the Court had granted additional time to respond. The motion for sanctions was a direct attack on petitioner and a demand that petitioner be held personally liable for Luce Forward's alleged attorneys' fees and costs.

But petitioner's clients had previously given a written release to Graham and Luce Forward. The terms of that release provided that the Shens would be liable for attorneys' fees if they sought to set aside the release or to surcharge the trustee and his counsel for misconduct in the administration of the Shen estate. [*See* 1 *Excerpt of Record* 125, 126:29 - 127:4.]

California law automatically makes such contract provisions for attorneys' fees mutually reciprocal. *California Civil Code* § 1717. But the Shens had to prevail on their motion in order to avoid attorney fee liability.

Luce Forward's oral motion for sanctions created a conflict of interest between petitioner and his clients as to who would be liable for fees if the motion to reopen failed. It was too late for petitioner to withdraw, and petitioner could not speak out in his own defense without violating his primary obligation of undivided loyalty to the Shens.

The court signed its decision on September 10, 1980 but did not file it until September 16, 1980. [*See* Appendix 1, annexed to this petition, and 6 *Excerpt of Record* 1844, 1858:20.] During that interim, Congress amended 28 U.S.C. § 1927 on September 12, 1980 to specifically authorize the imposition of fee sanctions against counsel. The amended statute prescribes no procedure for the sanction assessment.

The court denied the Shens' motion to reopen, granted Luce Forward's oral motion for sanctions, and ordered petitioner to pay a fee and cost penalty in the amount of $36,339.29 for attempting to reopen the case in alleged bad faith. In doing so, the court relied on its inherent power under *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), rather than on the amended language of 28 U.S.C. § 1927. The Court also made the Shens jointly liable for the assessment. *Matter of Shen*, 7 Bankr. 942, 949 (S.D.Cal. 1980).

The court denounced petitioner's efforts as an "unreasonable and vexatious multiplication of the Shens' bankruptcy proceedings" and described the motion to reopen as a "frivolous," "willful and bad faith abuse" of judicial processes "bordering on attempted fraud upon the Court."

The district judge also accused petitioner of squandering the court's time in pursuit of a "manifestly unmeritorious" motion, thereby contributing to the "glacial pace" of modern litigation, breeding

"frustration with the federal courts, and ultimately disrespect for the law." The court questioned petitioner's legal ethics and recommended the initiation of disbarment proceedings.[1] *See Matter of Shen*, 7 Bankr. 942, 944 at text accompanying footnotes 1 and 2, 946, 949, and 950 (S.D.Cal. 1980).

Articles about the decision appeared immediately in the major San Diego metropolitan newspapers. *See Judge Denounces Shen Bid, Denies Bankruptcy Motion*, San Diego Union, September 17, 1980, at B5, col. 1; and *Shen Case Stirs Sharp Opinion by U.S. Judge*, San Diego Evening Tribune, September 17, 1980, at B1, col. 6.

The adverse publicity was ruinous to petitioner's law practice. [*See* "Declaration of Michael Kaye in Opposition to Luce Forward's Dismissal Motion," dated December 31, 1981.] The Shens had been petitioner's primary clients. For their own protection and to avoid any risk of conflict of interest, petitioner had to withdraw from representing them. Petitioner's credibility and effectiveness as an advocate have been deeply impaired, and he has been unable to rebuild any substantial practice.

Petitioner appealed on his own behalf to the U.S. Court of Appeals for the Ninth Circuit. Luce Forward moved to dismiss the appeal for purported mootness. On February 4, 1981, a motion panel denied Luce Forward's motion and authorized the appeal to proceed. [*See* Appendix 2, annexed hereto.]

On February 19, 1981, Luce Forward filed a motion in the District Court to require an appellate cost bond in the amount of $25,000. It estimated that it would incur $20,000 in attorney fees and $5,000 in costs in resisting the appeal.

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[1] For reasons unknown to petitioner, there has been no disciplinary investigation as yet. Petitioner has never been disciplined by any bar organization in this or any other matter.

Petitioner filed papers in opposition to the motion. The District Court took no immediate action. The parties proceeded to brief the appeal.

Luce Forward renewed its cost bond motion on July 24, 1981. It attached copies of both parties' appellate briefs for the District Court to review. The new motion reduced Luce Forward's bond request to $15,000. It gave no breakdown between costs and attorney fees.

Petitioner filed further opposition papers, noting *inter alia* that Luce Forward by then had incurred virtually all of its potentially taxable costs but had failed to itemize the exact amounts.[2]

The District Court took no action until October 5, 1981 — nearly 13 months after its initial decision. The Court then rejected Luce Forward's attorney fee demand but ordered petitioner to post a $5,000 cost bond on the basis of Luce Forward's original unitemized cost estimate. The bond order was not entered or mailed to the parties until October 29, 1981. [*See* Appendix 3, annexed hereto.]

Petitioner notified Luce Forward by letter dated November 12, 1981 that his law practice was in ruins and that he no longer owned or controlled anything close to $5,000 in assets. Local bonding agencies had refused to issue a bond without full collateral. [*See* Exhibit "B" attached to Luce Forward's "Motion to Dismiss for Failure to Post Cost Bond."]

Luce Forward waited until Christmas eve, less than two weeks before the scheduled date of oral argument on the merits of the appeal. It then served and filed a second dismissal motion, this time based on petitioner's failure to post the bond.

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[2] For a complete collection of Luce Forward's motion papers and petitioner's responses filed in the District Court in connection with the cost bond issue, *see* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Cost Bond or Waive Security for Costs," submitted to the Ninth Circuit on December 31, 1981.

Petitioner filed extensive and timely opposition papers on December 31, 1981. Those papers included a detailed declaration of his financial condition, a comprehensive brief on the cost bond issues, and a compilation of all the District Court filings which led up to the cost bond order.

Petitioner showed that the $5,000 bond assessment substantially exceeded his financial resources. But he also demonstrated that any cost award potentially taxable in Luce Forward's favor would not reasonably exceed $300. That amount was well within petitioner's ability to pay. Petitioner could neither post the bond nor qualify to proceed *in forma* pauperis.[3]

Luce Forward's eleventh hour dismissal motion was forwarded from the Ninth Circuit Clerk's office in San Francisco to the appellate panel in Los Angeles. Petitioner's response papers were not.

On January 5, 1982, the panel refused to hear oral argument on the merits of the appeal. Instead it announced a summary dismissal of the appeal on the basis of Luce Forward's motion papers alone. The Court entered a formal dismissal order on January 18, 1982. [*See* Appendix 4, Annexed hereto.]

Petitioner made timely application for a rehearing, which the Court of Appeals denied by order dated February 24, 1982. [*See* Appendix 5, annexed hereto.]

Luce Forward was entitled to costs upon dismissal. But it never applied for and never documented those costs.

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[3] *See* (1) "Appellant's Opposition to Luce Forward's Dismissal Motion and Appellant's Cross-Motion to Reduce $5,000 Bond or Waive Security for Costs," and (2) "Declaration of Michael Kaye in Opposition to Dismissal Motion," dated December 31, 1981.

REASONS FOR GRANTING THE WRIT

A. Review Should Be Granted To Establish Procedural Standards For The Imposition Of Attorney Fee Sanctions Under *Roadway Express, Inc. v. Piper*

In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), this Court reaffirmed the inherent power of the federal judiciary to impose attorney fee sanctions against lawyers who commence or conduct litigation in bad faith. Congress supplied a statutory foundation for that power when it amended 28 U.S.C. § 1927 on September 12, 1980, by Public Law 96-349, § 3, 94 Stat. 1156.

Neither *Roadway Express* nor the amended statute spell out procedural standards which federal courts should observe before assessing sanctions. But this Court has cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. at 764. "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*, 447 U.S. at 767.

The procedural history of *Roadway Express* gave no occasion to discuss due process requirements at any length. The District Court had severed the sanction proceedings from any hearing involving the merits of the case in chief. An order to show cause preceded the sanction hearing by more than three months. The accused attorneys were allowed to withdraw as counsel in order to avoid any potential conflict of interest with their clients, and the Court extended additional time to permit discovery with respect to the costs and attorney fees in question.

The attorneys had the benefit of "an evidentiary hearing" on the imposition of sanctions. They apparently raised no due process or jury trial issues at any stage of the litigation. *See* the lower court opinions *sub nom. Monk v. Roadway Express, Inc.*, 73 F.R.D. 411, 413 (W.D. La. 1977), *vacated*, 599 F.2d 1378, 1380-1381 (5th Cir. 1979).

But the present case demonstrates the risk of serious procedural unfairness where sanctions are imposed without sensitivity to constitutional standards. Here, the sanction proceedings intruded into a hearing on the merits; there was no advance notice that the hearing would include sanction matters; petitioner had no opportunity to withdraw to avoid a potential conflict of interest with his clients; there was no provision for discovery and no opportunity to call, confront, examine, or cross-examine witnesses.

The District Court conducted only a unilateral hearing on sanctions, because Luce Forward strategically withheld its sanction motion and delayed the service and filing of its fee and cost declarations until after petitioner had fully exhausted his allotted 30 minutes of oral argument. Petitioner devoted his time to the merits of his own clients' motion. He had no opportunity to respond to Luce Forward's procedural ambush.

It would be a denial of due process to penalize an accused person for an offense not properly charged. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); *Parr v. United States*, 363 U.S. 370, 394 (1960). Time and again, this Court has said that fair notice must apprise the accused of the specific charges against him and must inform him of the time and place of the hearing far enough in advance to afford an adequate opportunity to prepare a defense. *See, e.g., In re Ruffalo*, 390 U.S. 544, 550-552 (1968); *Ex Parte Bradley*, 7 Wall. (74 U.S.) 364, 372-373 (1868).

Notice is defective if it fails to specify the charges or if new charges suddenly spring up at a hearing that was duly noticed on different grounds or for a different purpose. *Schleper v. Ford Motor Co.*, 585 F.2d 1367, 1372 (8th Cir. 1978); *Pabst Brewing Co. v. Brewery Workers Local No. 77*, 555 F.2d 146, 150-151 (7th Cir. 1977); *Skinner v. White*, 505 F.2d 685, 690-691 (5th Cir. 1974); *United States v. Peterson*, 456 F.2d 1135 (10th Cir. 1972).

Where important interests are at stake, due process contemplates more than mere propriety of notice. It also requires an opportunity to confront

and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970). The proceedings below afforded no such hearing.

The District Court took triable issues of fact and summarily resolved those issues against petitioner. The result, in effect, became a summary judgment for malicious prosecution, abuse of process, or criminal contempt. The penalty descended on petitioner without proper notice, without regular pleadings, without discovery, without trial by jury, and indeed without any proper trial or adequate hearing at all.

A claim is made in "bad faith" when it is (1) entirely without color, and (2) made for reasons of harassment or delay or for other improper purposes. *Nemeroff v. Abelson*, 620 F.2d 339, 348-349 (2d Cir. 1980). That definition is a leading guideline for the imposition of federal fee sanctions.

But the definition of bad faith in *Nemeroff v. Abelson* also corresponds to the two substantive elements of malicious prosecution. A claim that is entirely without color is a claim which lacks probable cause. *See Tool Research & Engineering Corp. v. Henigson*, 46 Cal.App.3d 675, 682-684, 120 Cal.Rptr. 291, 296-298 (1975) (malicious prosecution action against attorney). And the malice required in an action for malicious prosecution "exists when the proceedings are instituted primarily for an improper purpose." *Albertson v. Raboff*, 46 Cal.2d 375, 383, 295 P.2d 405, 410 (1956) (per Traynor, J.).

"[A] request for attorneys' fees under the bad faith exception is really a malicious prosecution suit in disguise. . . ." Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U.Pa.L.Rev. 468, 482 (1979).

Historically, the Seventh Amendment has guaranteed the right to jury trial in malicious prosecution cases. *See, e.g., Stewart v. Sonneborn*, 98 U.S. 187 (1879); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* par. 38.11[5] at fn. 12 (2d ed. 1980). The invention of new procedures cannot defeat jury trial rights that are rooted in traditional

tort practice. *Compare Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442, 458-459 (1977), *with Curtis v. Loether*, 415 U.S. 189, 195-196 (1974).

For that reason, the Sixth Circuit in a pre-*Roadway* case concluded that federal courts do not have inherent power to impose bad faith fee sanctions under the guise of fixing costs because to do so would be equivalent to rendering a tort judgment without trial by jury. *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

Roadway Express superseded *Smoot* to the extent of authorizing fee sanctions. But this Court has not yet addressed the Seventh Amendment issue posed by *Smoot*.

Furthermore, the right to jury trial in at least some "bad faith" cases may also arise under the Sixth Amendment. The District Court repeatedly condemned petitioner for alleged misconduct "bordering on attempted fraud upon the Court." *Matter of Shen*, 7 Bankr. 942, 944, 946 (S.D.Cal. 1980). A charge of "fraud on the court" implies a direct insult to the court's dignity and authority. It is an accusation of criminal contempt. *Skinner v. White*, 505 F.2d 685, 689 (5th Cir. 1974).

Attorney fee sanctions, like criminal contempt sanctions, are punitive in purpose. *Hall v. Cole*, 412 U.S. 1, 5 (1973). Courts are not exempt from Sixth Amendment restraints when they exercise an inherent power to impose punishment. *Bloom v. Illinois*, 391 U.S. 194 (1968) (criminal contemnor cannot be sentenced to more than six months in jail without the procedural safeguard of trial by jury).

There was no jail sentence in the case at bar. But the court levied sanctions against petitioner in the amount of $36,339.29. In *Muniz v. Hoffman*, 422 U.S. 454, 476-477 (1975), this Court expressly reserved the question whether an individual in a criminal contempt case would be entitled to trial by jury if faced with the risk of a substantial fine. Several lower courts have answered that question in the affirmative. *See, e.g.*,

Girard v. Goins, 575 F.2d 160, 162-165 (8th Cir. 1978); and *Douglass v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976) (jury trial required if fine exceeds $500).

The fact that a private party prosecuted the contempt and was awarded the fine does not defeat the character of the sanction as a punishment for criminal contempt. *See Nye v. United States*, 313 U.S. 33, 41-43 (1941); *Michaelson v. United States*, 266 U.S. 42, 65 (1924); and 18 U.S.C. § 402.

The penalty in this case was the functional equivalent of both a tort judgment and a criminal contempt fine. Petitioner had a right to trial by jury under both the Sixth and the Seventh Amendments. He never waived that right.

This Court should prescribe the following procedural safeguards for fee sanction cases:

1. The sanction proceedings should be severed or bifurcated from any hearing on the merits in the case in chief. Otherwise, meretricious demands for fee sanctions may become a routine litigation tactic to chill the opposition, drive a wedge between attorney and client, obfuscate the issues on the merits, and distract and confuse the trier of fact. That is why counterclaims for malicious prosecution have traditionally been disallowed. *See Babb v. Superior Court*, 3 Cal.3d 841, 844, 847-848, 479 P.2d 379, 380, 382, 92 Cal.Rptr. 179, 180, 182 (1971); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 261 F.Supp. 691, 695, 696-698 (S.D.N.Y. 1966); Note, *Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious*, 58 Yale L.J. 490, 493 at text accompanying fn. 12 (1949).

2. The accuser should provide an exact specification of charges and advance notice of the hearing at which those charges will be considered.

3. The accused party or attorney should have a right to call and examine favorable witnesses and to confront and cross-examine adverse witnesses.

4. Where the demand for sanctions is equivalent to a tort claim for malicious prosecution or abuse of process, there should be a right to jury trial under the Seventh Amendment.

5. Where the court accuses an attorney of serious misconduct which threatens the dignity and authority of the tribunal and where the prospective penalty may exceed $500, the accused should have a right to trial by jury under the Sixth Amendment.

B. Pretermission Of Issues By the Ninth Circuit Does Not Preclude Review Where The Issues Were Presented Below, Are Ripe For Decision, And Are Important To The Administration Of Justice

Both parties fully briefed the due process and jury trial issues discussed in the preceding section of this petition. But the Ninth Circuit pretermitted those issues, dismissing petitioner's appeal without reaching either the major procedural questions or the underlying issues on the merits.

The general rule is that this Court does not grant certiorari to review questions which the Court of Appeals has failed to address or resolve. That rule has sometimes applied even when the parties carefully raised and briefed a pretermitted issue in the lower court. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).

But the rule against reviewing pretermitted issues is not inflexible. It does not apply where the obvious result would be a plain miscarriage of justice. *Hormel v. Helvering*, 312 U.S. 552, 555-558 (1941). The Court may always take notice of fundamental error even where the parties have failed to make objection below. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court recognized the Ninth Amendment as an important foundation of the right to privacy

even though Ninth Amendment issues had not been raised at the trial. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L.Rev. 219, 227 (1965). And in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court overruled a prior decision of many years' standing on a basis neither urged below nor pressed by the parties in their Supreme Court arguments. *See Blorder-Tongue v. University Foundation*, 402 U.S. 313, 320-321 fn. 6 (1971).

More recently, this Court has considered new issues raised for the first time on appeal or certiorari in *United States v. Mendenhall*, 446 U.S. 544, 551-552 fn. 5 (1980); *Carlson v. Green*, 446 U.S. 14, 17 fn. 2 (1980); and *Youakim v. Miller*, 425 U.S. 231, 233-234 (1976).

There are two reasons for the policy against reviewing pretermitted issues. In the first place, that policy enforces sound judicial administration. It prevents tactical "sandbagging" by unscrupulous counsel. It forces the parties to lay out all their cards at once, to introduce all material evidence at the outset, and to raise all meritorious arguments so that the lower courts will have a maximum opportunity to reach a proper disposition of the case in the first instance. No lawyer has a right to store evidentiary or analytical aces up his sleeve. An effective presentation of all issues in the lower court will often make certiorari review unnecessary.

That purpose is not served by declining review where (1) a party was deprived of proper notice, hearing, or trial in the initial forum, or (2) where important issues were conscientiously raised and argued by the parties below but were pretermitted by the lower court. Inferior tribunals should not be allowed to evade review by a flagrant denial of due process or by suppression, circumvention, or glossing over of important questions duly presented.

A second purpose of the rule against reviewing pretermitted issues is to protect this Court from having to rule on important and difficult questions without the benefit of a preliminary judicial analysis. Emerging principles of law need time for seasoning before they ripen for final

disposition. The highest court of the land should not have to sail on an uncharted sea or blaze new paths through an unexplored wilderness.

Lower courts play an important role in preparing the way. Even when they err, their preliminary forays are like flares in the night. Their tentative first analysis at least lights up the contours of the land. But that preliminary sifting of issues by the court below is not indispensable where other courts and scholarly commentators have already performed an equivalent first analysis.

This Court itself has already warned that fair notice and hearing are essential in fee sanction cases. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). On the basis of that cautionary dicta, at least one Court of Appeals has already reversed a fee penalty where the sanctions had been imposed without a proper hearing. *Glass v. Pfeffer*, 657 F.2d 252, 257-258 (10th Cir. 1981).

A district judge has already noted with alarm the danger that fee sanction proceedings will have the effect of driving a wedge between attorney and client. *Robinson v. Ritchie*, 516 F.Supp. 437, 439-440 (E.D.Va. 1981). *See also Babb v. Superior Court*, 3 Cal.3d 841, 847-848, 479 P.2d 379, 382, 92 Cal.Rptr. 179, 182 (1971). It is that ominous potential conflict which justifies procedural bifurcation to isolate sanction proceedings from any hearing on the merits.

The Sixth Circuit has already developed an analysis of fee sanctions with an eye toward the Seventh Amendment right to jury trial. *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied sub nom. League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

The California Supreme Court will issue a decision in the near future that is expected to include a major analysis of the due process issues involved in the summary assessment of fee sanctions against counsel without notice or hearing. The title of the case is *In re Marriage of Flaherty*, S.F. 24307 (argued October 1, 1981). *See* Carrizosa, *High*

Court Tackles Worrisome Issue of Frivolous Appeals, Los Angeles Daily Journal, September 29, 1981, at 1, col. 4.

Meanwhile, student commentators are actively assaying the field. *See, e.g.*, Comment, *Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L.Rev. 950 (1980); Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U.Pa.L.Rev. 468 (1979); Comment, *Groundless Litigation and Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218 (1979).

The sanctions against petitioner came without proper notice, hearing, or trial. There is a presumption against waiver of those procedural rights whether or not formal objection was raised in the District Court. *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Girard v. Goins*, 575 F.2d 160, 162-163 (8th Cir. 1978); *In re Zweibon*, 565 F.2d 742, 746-747 (D.C. Cir. 1977). Such exceptional irregularities are subject to this Court's power to notice plain error. R. Stern & E. Gressman, *Supreme Court Practice* § 6.27 at 460 (5th ed. 1978).

Petitioner conscientiously raised and fully briefed those procedural issues in the Court of Appeals. Despite pretermission of those issues by the Ninth Circuit, ample preliminary analysis of every major issue is available from other courts and commentators.

Petitioner has narrowly restricted his choice of issues at this stage to avoid drawing the Court into the quicksands of disputed fact. The issues are procedural. They are sufficiently ripe. Their resolution is important, beyond the immediate case, to the sound administration of justice in the federal courts. There is no compelling policy reason to refuse review.

C. Review Is Warranted To Determine Whether District Courts Must Fix Cost Bond Assessments Under Rule 7 Of The Federal Rules Of Appellate Procedure At Amounts Reasonably Related To Actual Costs Or Whether Exaggerated Assessments Are Permissible To Deter Or Obstruct Appeals Alleged To Be Frivolous

If this Court is reluctant to address the foregoing due process and jury trial issues in the first instance, this case presents one further question which is fully ripe and sufficiently important to justify review at this time.

The cost bond issue is amenable to summary disposition. On that issue alone, the Court could appropriately grant certiorari, summarily reverse, and remand to the Ninth Circuit for a full decision both on the remaining procedural issues raised here and on the merits.

Prior to 1979, Rule 7 of the Federal Rules of Appellate Procedure fixed the cost bond in every civil appeal at a uniform rate of $250. But the amended rule now in effect leaves the amount of the bond to the discretion of the District Court.

The Rule 7 issue posed by this case is whether District Courts may adjust the bond amount on the basis of their evaluation of the merits of an appeal rather than on a reasonable approximation of actual costs.

Several district judges have assumed that the amended version of Rule 7 gives them a screening prerogative. They think it is their duty to impose high cost bonds to deter frivolous appeals and low cost bonds to encourage meritorious appeals. *See, e.g., Hughes v. Defender Association of Philadelphia*, 509 F.Supp. 140, 142-143 (E.D.Pa. 1981); and *cf. Page v. A. H. Robins Co., Inc.*, 85 F.R.D. 139, 140 (E.D.Va. 1980).

Those decisions are wrong for two reasons. In the first place, the legislative history of the amended rule says nothing about a screening function. The revisers abandoned the old $250 amount because "[t]oday

it bears no relationship to actual costs." 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* par. 207.01[4] (2d ed. 1980). The $250 figure "was hopelessly out of date and any other specific figure would have been completely arbitrary." R. Stern, *Appellate Practice in the United States* 108 (1981).

If the revisers had intended to establish a screening authority, so significant a change would have been reflected in the legislative history and in new procedural protections to safeguard against any abuse of discretion in the screening process.

Rule 24(a) of the Federal Rules of Appellate Procedure specifically authorizes District Courts to examine the merits of pending appeals in *forma pauperis* cases and to certify whether or not such appeals are taken in good faith. But that authority is hedged about with procedural safeguards, including a specific and rapid prescribed procedure for appellate review. No such guidelines for review appear in Rule 7. None were needed, because that rule never contemplated merits screening.

A second reason why district judges may not screen appeals is that to do so would implicate them as direct participants in review of their own decisions. Such an intrusion on the appellate domain is impermissible. *See Rexford v. Brunswick-Balke Co.*, 228 U.S. 339, 343-344 (1913); *Moran v. Dillingham*, 174 U.S. 153, 156-157 (1899); *United States v. Lancaster*, 5 Wheat. (18 U.S.) 434 (1820); *Rice v. McKenzie*, 581 F.2d 1114, 1116-1118 (4th Cir. 1978); *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 135, 136-137, 13 A.L.R.Fed. 850 (4th Cir. 1970).

"No judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47. That prohibition should reasonably extend to any screening authority over appeals. Otherwise every district judge would become, in effect, a fourth member of the appellate panel reviewing his own decisions. By flagging an appeal as frivolous and setting an insurmountable cost bond, the district judge would be in a position to virtually foreclose the appeal and thereby determine its outcome.

That potential conflict with the prohibitions of 28 U.S.C. § 47 is barely avoided under Rule 24 by requiring the district judge to state his reasons in writing and by spelling out a procedure for rapid and independent appellate review. No such saving grace appears in Rule 7.

The purpose of a cost bond is to assure payment of appellate costs in a civil case in the event an appeal fails. Only the appellant is ever required to post such a bond. The exclusive purpose of the bond is to protect the appellee. 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* par. 207.02 (2d ed. 1980).

Not all taxable costs can be counted in computing the proper amount of a cost bond. Filing fees, docket fees, costs of printing the record and premiums paid for supersedeas or other bonds are taxable against an appellee under 28 U.S.C. § 1920(5) and Rule 39(c) and (e) of the Federal Rules of Appellate Procedure if an appeal succeeds. But those items are not taxable against an appellant if an appeal fails. Those costs are paid initially by the appellant out of his own pocket. The successful appellee never incurs those costs and does not need security to assure reimbursement of expenses he never paid. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3953 at 379 fn. 5 (1977).

The only items that should be taken into account in determining the proper amount of a cost bond are the costs of (1) reporters' transcripts, (2) the clerk's record, and (3) printing the appellee's briefs at rates not higher than those generally charged for such work in the area where the clerk's office is located." *Rule* 39(c).

A motion to fix security for costs should be supported by "a realistic estimate" of the actual costs that would be taxable in the appellee's favor in the event of affirmance. D. Knibb, *Federal Court of Appeals Manual* § 10.1 at 114 (1981).

Luce Forward never itemized its $5,000 cost estimate. Petitioner, on the other hand, demonstrated that the costs potentially taxable in Luce Forward's favor would not equal even one tenth of respondents'

exaggerated demand. [*See* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Cost Bond or Waive Security for Costs," at 2, 4:28-32; at 6, 17:9 - 20:17; and at 31, 32:10-15.]

There was no trial in this case. The hearing transcripts were minimal. Luce Forward xeroxed and velobound its briefs in very presentable but inexpensive fashion. The only substantial cost was for printing the record. But that expense was borne by petitioner, not by Luce Forward.

Nevertheless, the District Court embraced Luce Forward's pumped-up estimate and brushed off petitioner's strong showing that the $5,000 cost figure was a grossly unrealistic exaggeration. A reasonable inference that can be drawn from the $5,000 bond order is that the District Court must have accepted Luce Forward's characterization of the appeal as "frivolous." [*See* "Document Appendix in Support of Appellant's Cross-Motion to Reduce $5,000 Bond," *supra*, at 2, 3:21-23.]

The Court therefore imposed a Rule 7 cost bond equal to the highest amount that had ever previously been approved in a reported opinion. *See Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 224 (10th Cir. 1980).

That amount was beyond petitioner's financial resources. [*See* "Declaration of Michael Kaye in Opposition to Luce Forward's Dismissal Motion," dated December 31, 1981.] On the other hand, petitioner could not qualify to proceed *in forma pauperis* because he freely conceded that actual costs would be well within his ability to pay. *See Adkins v. DuPont Co.*, 335 U.S. 331, 339 (1948).

Petitioner could pay actual costs. But he could not post an exaggerated bond set arbitrarily at more than ten times any realistic estimate of what those actual costs would be. The bond order became a technical pretext to torpedo petitioner's appeal.

That is the precise result Luce Forward sought. Cost reimbursement was not its objective. Luce Forward didn't even apply for costs after the

dismissal. Indeed, a cost application would have embarrassed Luce Forward by confirming the enormous discrepancy between its actual costs and the amount of the bond order.

A security bond which, for all practical purposes, denies a party his day in court, "transcends the bounds of sound judicial discretion." The discretion of the District Courts to issue orders for security contemplates only such orders "as will facilitate, not hamper, the administration of justice." *Farmer v. Arabian American Oil Company*, 285 F.2d 720, 721, 722 (2d Cir. 1960).

In most appeals today, no bond for costs is requested or filed. Dismissal for failure to post a bond is a rare and extreme sanction. D. Knibb, *Federal Court of Appeals Manual* § 10.1 at 113-114 (1981).

The Ninth Circuit summarily dismissed the appeal, faulting petitioner for failing to make a timely motion to reduce the bond. [*See* Appendix 4, annexed hereto.] But Rule 7 neither prescribes nor authorizes any such motion procedure. The customary practice has always been to wait for a dismissal motion and respond to that. *See, e.g., Carr v. Grace*, 516 F.2d 502, 504 (5th Cir. 1975); and *Settler v. Yakima Tribal Court*, 419 F.2d 486, 487 fn. 2 (9th Cir. 1969) *cert. denied*, 398 U.S. 903 (1970).

The leading treatises about how to reduce an inordinate Rule 7 bond. *See, e.g.*, 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* par. 207.02 (2d ed. 1980); and 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3953 (1977).

The Rule 7 issue is amenable to summary disposition if this Court so prefers. In that event, the Court should hold as follows:

(1) The sole function of the District Court under Rule 7 is to set the cost bond at an amount approximating as closely as possible the actual costs that would be taxable against the appellant if the appeal fails. The bond should be based on an itemization of actual costs, where available, otherwise on credible and realistic estimates.

(2) It is an abuse of discretion for the District Court to fix the bond amount by any other standard. In particular, the District Court should not adjust the bond upward or downward to correspond to its view of the merits of the appeal.

(3) The Court should establish an appropriate procedure [*e.g.*, by motion, extraordinary writ, appeal, or merely waiting to oppose a dismissal motion] for appellants to follow in the future in seeking review of excessive Rule 7 bonds.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review all issues presented.

The Court may prefer to remand to the Ninth Circuit to rule on the due process and jury trial issues in the first instance. In that event, review may be limited here to the Rule 7 question, and on that issue the judgment below should be summarily reversed or vacated.

Dated: May 24, 1982

Respectfully submitted,

/s/
MICHAEL KAYE

Petitioner Pro Se

APPENDICES

APPENDICES

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FILED
ENTERED
LODGED

SEP 16 1980

CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

SEP 1 1980

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of	Chapter XII
SAMUEL T. H. SHEN	Bankruptcy Nos. 74-607-K
and	74-608-K
CAROLYN JEAN SHEN,	OPINION
Debtors.	

Incredibly, after six years of proceedings in the bankruptcy court involving seventeen different appeals and eight different lawyers for the bankrupts, Mr. and Mrs. Samuel T. H. Shen, ex-debtors, and Mr. Michael Kaye, their lawyer, have moved, pursuant to Bankruptcy Rule 515, to reopen the bankruptcy proceedings in order to charge the Trustee in Bankruptcy, Mr. Theodore Graham, and his counsel, the law firm of Luce, Forward, Hamilton and Scripps, with certain acts of misconduct. The bankruptcy proceedings were dismissed voluntarily on December 20, 1979, several months after the Shens and Mr. Kaye had executed in the presence of the court a release of the very claims and demands against the Trustee and his counsel which are herein asserted as grounds for the motion to reopen. When stripped of the ill-supported arguments urged on this Court by Mr. Kaye, the feeble excuse which underlies his outrageous attempt to set aside the release is that he exercised "poor judgment" in signing the release and disavowing participation in any

further proceedings to challenge the release. We might add that he has exercised even worse judgment in attempting to repudiate his signature and in unashamedly abusing the processes of the courts. Mr. Kaye's initiation and pursuit of the present motion raises a substantial question as to his legal ethics[1] as well as his right to continue to practice before this Court.[2] This Court finds that the motion is an unreasonable and vexatious multiplication of the Shen's bankruptcy proceedings, is an abuse of the Court's processes, and is frivolous, bordering on an attempt to have the Court become a party to fraud. The Court futher finds that the Shens and Mr. Kaye have willfully and in bad faith committed this abuse. For these reasons, and those set forth below, the motion to reopen is denied, and attorneys' fees and costs incurred by Mr. Graham and the firm of Luce, Forward, Hamilton and Scripps in connection with the instant motion are assessed jointly and severally against the Shens and Mr. Kaye in the amount of $36,339.29.

I

Only the details of the labyrinthine bankruptcy proceedings most pertinent to the motion presently under consideration are here discussed. In March, 1974, the Shens first sought relief under the federal bankruptcy laws by filing a petition for relief under Chapter XII of the Bankruptcy Act. Theodore Graham was appointed operating trustee shortly after the filing of the initial Chapter XII petition. The firm of Luce, Forward, Hamilton and Scripps, in which Mr. Graham is a partner, was appointed counsel to Mr. Graham throughout his tenure as Trustee. On November 7, 1975, the Shens were adjudicated bankrupts. On June 4, 1976, Mr. and Mrs. Shen filed a petition for arrangement under Chapter XI of the Bankruptcy Act and were again adjudicated bankrupts shortly thereafter. Mr. Graham proffered his resignation as Trustee of the Shen estate to the bankruptcy court on October 31, 1978, and the court accepted his resignation on November 9, 1978. On March 26, 1979, Martin Goldberg, the special auditor appointed by the bankruptcy court, filed his report approving the Trustee's handling of the Shen estate. An order formally discharging Mr. Graham as Trustee was

entered on May 18, 1979. In his Memorandum of Opinion Re: Fee Applications dated July 18, 1978, Judge Katz noted the following:

> "Suffice it to say that at the commencement of these proceeding the debtors were insolvent in every sense of the word. Today, some four years later, all unsecured creditors have been paid in full with interest, the so called 'equity claimant' class of creditors has been satisfied, the secured creditor problems are basically resolved, and the debtors have an estate, net to them, approximating over $1 million.
>
> It cannot be gainsaid that the inflationary real estate market in Southern California was at least in part responsible for this success. However, it is also due in large measure to the efforts of Mr. Graham who undertook to resolve many of the problems facing the debtors and, in my opinion did so with a view in mind of serving the interests of his constituency, namely the creditors, while at the same time protecting the debtors. He did this in the face of numerous changes of counsel for the debtors as well as the oft evident contrariness of Mr. Shen."

The Shens again filed a Chapter XII petition on November 21, 1979, and voluntarily dismissed the bankruptcy proceedings on December 20, 1979.

After Mr. Graham's resignation as Trustee, he and his law firm sought collection of fees and determination of any claims the Shens might have against them arising from the fulfillment of their respective duties to the Shen estate during the period of the Graham trusteeship. These issues were resolved through a settlement, the terms of which were embodied in a stipulated order signed by Judge Katz and approved by the Shens and their attorney Michael Kaye on April 20, 1979. The signatures of Samuel T. H. Shen, Carolyn Jean Shen, and Michael Kaye all appear on an attachment to Judge Katz' order indicating that the stipulated order was approved *both as to form and content*, and that all rights of appeal and reconsideration of the order were waived. The findings of fact incorporated in Judge Katz' order included the following:

"2. The Trustee's final report and account is accurate and proper.

3. The Trustee has satisfactorily performed all of the duties required of him under the National Bankruptcy Act, the Rules promulgated by the United States Supreme Court, and all orders and judgments of this Court.

4. SAMUEL T. H. SHEN and CAROLYN JEAN SHEN released the Trustee and his counsel of their own free will without undue influence being exerted upon them.

5. The release attached hereto is fair to SAMUEL T. H. SHEN and CAROLYN JEAN SHEN, debtors and debtors-in-possession herein.

6. SAMUEL T. H. SHEN and CAROLYN JEAN SHEN have received the advice of competent counsel regarding the release.

• • • • •

9. The withdrawals, dismissals and release by the debtors and debtors-in-possession are reasonable and appropriate. The offer by the Trustee and his counsel is reasonable and appropriate. Such withdrawals, dismissals, release and offer will substantially reduce the litigation and administrative expenses in these proceedings and will resolve all disputes and claims, known or unknown, arising directly or indirectly out of these proceedings and will resolve all disputes and claims, known or unknown, arising directly or indirectly out of these proceedings between the debtors and the Trustee or his counsel, all as more specifically set forth in the release attached hereto."

Judge Katz' conclusions of law included the following:

"1. The release attached hereto is legally binding and enforceable according to its terms.

2. The fees and costs awarded by the provisions hereinbelow are reasonable in all respects.

3. The Trustee's Report and Account is accurate and proper and no liability of the Trustee nor his counsel has been established with respect to matters referred to in said Report and Account and no evidence has been offered to establish the same."

Following his findings of facts and conclusions of law, Judge Katz ordered, among other things:

"That LUCE, FORWARD, HAMILTON & SCRIPPS and each of its partners and associates, THEODORE W. GRAHAM, individually and as Trustee of the above-named debtors in any and all proceedings under the National Bankruptcy Act, including the Chapter XII proceedings, the straight bankruptcy proceedings, and the converted Chapter XII proceedings, and the agents, employees, successors and assigns of each of them are released and forever discharged from any and all liability, claims, demands, actions, and causes of action, known or unknown, of every kind, description and nature, now existing or hereafter arising which SAMUEL T. H. SHEN, CAROLY JEAN SHEN, as bankrupts, debtors-in-possession or the successors or assigns of either of them have at any time held, presently hold, or with the passage of time will hold, all as more particularly set forth in the release attached hereto and incorporated herein by this reference; if there be any conflict between the terms hereof and said release, the terms of the release shall control."

The settlement further encompassed a release which was referred to in Judge Katz' order and signed by both Mr. and Mrs. Shen. The release is, in Mr. Kaye's terms, a "comprehensive exculpatory instrument." It

provides that both Mr. Graham and the Luce, Forward firm "are hereby released and forever discharged from any and all liability, claims, demands, actions, and causes of actions, known or unknown, of every kind, description and nature, now existing, or hereafter arising which claims have been held, are presently held, or with the passage of time will be held by the Releasing Parties or any of them."

The release also provided that the parties had executed the release of their own free will, were not acting under undue influence, and that they had consulted with counsel and received advice regarding the execution of the release. The final paragraph of the release was the following attorneys' fees provision:

> "7. In the event either of the Releasing Parties later attempts to set aside this release, claim that this release is unenforceable, in whole or in part, or seeks to impose liability upon any of the Released Parties with respect to the matters released under this release, all Releasing Parties jointly and severally agree to pay any and all attorneys' fees incurred by one or more of the Released Parties in their attempts to establish the effectiveness or application of this release."

At the time the release was executed, Mr. Kaye stated in open court that he would never appear to challenge the release which he had approved by signing it.[3] Nonetheless, Mr. Kaye filed the present motion and appeared at the hearing to represent the Shens, at which time he indicated that he wished to repudiate the signature he had made earlier in open court. His motivation for so doing was set forth in his affidavit, which makes clear that he now has concluded that execution of the release by him and his approval of it represented poor judgment on his part.

All agree that the Shen's estate is now fully solvent. The Shens do not seek to have the bankruptcy court resume general administration over the Shen's property. Rather, they seek a variety of sanctions against Mr.

Graham and his law firm on a number of grounds, which include refusal to surrender books and records of the estate, concealment of records, illegal seizure of mail, failure to disclose conflicts of interest, filing of false accounts, breach of fiduciary duty, and fraud on the bankruptcy court, each and every one of which was the subject of the aforesaid release of claims and demands.

As the Court has made clear, the release is a valid, duly executed document approved by the Court and the parties at a special hearing, and it operates as a bar against further pursuit of the claims and demands specified therein, even through a proceeding under Bankruptcy Rule 515. But were the Court to look beyond the release and consider the merits of the outrageous charges brought against Mr. Graham and his firm in the light most favorable to the debtors, it still would dismiss the charges as being frivolous, bordering on attempted fraud upon the Court.

II

A motion to reopen bankruptcy proceedings under Bankruptcy Rule 515 is addressed to the sound discretion of the trial judge, and the granting or denial of such a motion will be reversed only for abuse of that discretion. *In Re Haker*, 411 F.2d 568 (5th Cir. 1969); *Kheel v. Bethlehem Steel Co.*, 355 F.2d 187 (9th Cir. 1965). Such a motion will be granted only for cause shown, *Hull v. Powell*, 309 F.2d 3 (9th Cir. 1962), and the determination of what constitutes sufficient good cause is within the trial court's discretion. *Bartle v. Markson*, 357 F.2d 517 (2d Cir. 1966). The burden of proof in establishing good cause is on the party seeking to reopen the bankruptcy proceeding. *In Re Fair Creamery Co.*, 193 F.2d 5 (6th Cir. 1951).

Of the many obstacles to be overcome by the Shens in order to meet their burden of proof to show good cause to reopen none is more formidable than the general release signed by the Shens and approved by their legal counsel, Michael Kaye. As is obvious from a reading of those provisions set forth in Section I, *supra*, the release is a broad instrument, the purpose of which is to put to rest precisely the types of claims the

Shens are asserting as grounds for their Rule 515 motion. The release by its terms embraces "all liability, claims, demands, actions, and causes of actions, known *or unknown*, of every kind, description and nature, now existing, or hereafter arising * * *."

The Shens urge this Court to find the release invalid and unenforceable. The arguments they offer in support of such a finding are less than clear, but apparently are grounded in what they term as Mr. Graham's "double fiduciary status" at the time the release was executed. This status, Mr. and Mrs. Shen contend, results from Mr. Graham's position as ex-trustee of the Shen estate and his alleged usurpation of Mr. Kaye's role in advising the Shens on the merits of the settlement and release.

It is beyond question that bankruptcy trustees occupy a fiduciary position in releation (*sic*) to administration of bankruptcy estate assets. *In Re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). It is unclear, however, what fiduciary duty lingers after the trustee's resignation has been accepted by the bankruptcy court and the trustee is attempting to resolve questions of liability with ex-debtors. The Shens have offered no authority in support of their assertion that an ex-trustee operates in a fiduciary capacity in negotiating a settlement and release of liability with debtors. Resolution of this precise issue is not required by the facts of the present case though, since this Court finds that Mr. Graham's disclosures were more than adequate, whether or not he was operating as a fiduciary in negotiating the settlement and release here at issue.

"In the case of releases, as in other instances of dealing between the fiduciary and the person for whom he is acting, there must be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary * * *." Bogert, *The Law of Trusts and Trustees*, § 943. This Court finds that there was full disclosure on the part of Mr. Graham, and that the Shens were fully aware of the facts giving rise to their claims as well as their legal rights, which they have vigorously pursued throughout the course of their bankruptcy proceedings. For

example, the facts of the mail interception claims raised by the Shens were known to them well in advance of the settlement and release. On February 13, 1979, Mr. Shen stated these claims in a letter to Mr. Graham. The same claims were raised again at hearings on February 20, 1979, and March 12, 1979. Indeed, the legal theory of the mail interception claim, based in part on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which is raised here as a ground for rescinding the release and reopening the case, was concisely laid out in January, 1979, at page four of the "Debtors' Opposition to Proposed Order Modifying the Order Authorizing Trustee to Employ Real Property Manager" filed by Mr. Kaye on behalf of Mr. and Mrs. Shen.

Similarly, the estate records claim was raised by Mr. Shen in a letter to Mr. Graham dated February 7, 1979. Mr. Kaye seconded those claims by letter of February 8, 1979, to Mr. Graham. The detailed responses of the Luce, Forward firm, stating their position on the question of turnover of records, also served to inform the Shens of the facts surrounding the records issue. The legal theory of their records claim was set forth in full in April, 1979, in the debtors' opposition to the Trustee's fee application for the period from April 25, 1978, to April 1, 1979.

Mr. Shen's testimony on July 5, 1978, during an examination pursuant to Rule 205, demonstrates that in relation to the remaining claims asserted as a basis for the motion here under consideration--the Trustee's handling of the Fifth and Fir and Cherokee Avenue properties and the B & H Music litigation--there was sufficient disclosure on Mr. Graham's part and sufficient knowledge on Mr. Shen's part to support the validity of the release of those claims. The bulk of the substance of these claims is also outlined in the Trustee's motion to determine his responsibilities and liabilities filed on August 7, 1978. Furthermore, the problems associated with the Fifth and Fir property were fully set out, including the conflict of interest problem, during the June 21, 1978, hearing on the debtors' motion to remove the real property manager. The request for additional findings proposed by Mr. Kaye, dated July 27, 1978, shows detailed

knowledge of the conflict of interest issue. This Court's conclusion as to the adequacy of disclosure is provided further equitable support by the facts that Mr. Graham's firm held the estate records open for the Shens' inspection,[4] that the Shens refused to avail themselves of this opportunity, and that the Trustee actively and promptly sought to ferret out and to resolve these liability issues.[5]

The second facet of Mr. Graham's "double fiduciary status" allegedly stems from his usurpation of the role of the Shen's lawyer, Mr. Kaye, by means of a telephone conversation with Mr. Shen on the evening prior to the April 18, 1979, hearing at which the Shens executed the settlement and release. This Court finds that whatever influence Mr. Graham may have exercised on Mr. Shen's judgment on the evening of April 17 was more than compensated for by the advice of Mr. Kaye on the morning of April 18. The memorandum of release signed by the Shens contains in paragraphs four and five an explicit acknowledgment that the release was entered into without undue influence and upon advice of their lawyer. These acknowledgments were corroborated by Judge Katz' findings of fact Nos. 4 and 6. Moreover, Mr. Kaye himself by his signature approved these documents as to form and content.

This Court concludes that the grounds offered by the Shens for invalidating the release are entirely insufficient. Thus, they have failed to overcome the primary barrier to meeting their burden of persuasion on the showing of good cause required to open the bankruptcy proceedings. In addition to the reasons already provided, refusal to reopen the bankruptcy proceedings is further compelled by a number of additional factors. First, the Shens waived their rights to have the release reconsidered, but nonetheless pursued them with this motion. Furthermore, attorney Kaye stated to the bankruptcy court that he would not appear to challenge the release which he signed, but nonetheless has so appeared. Second, Judge Katz independently found the terms of the release and settlement fair, and both Judge Katz and auditor Goldberg approved the Trustee's handling of the Shen estate. Finally, federal courts have emphasized that "it is important to litigants and the

public alike that there be effective and expeditious disposition of disputes which reach the courts, and this consideration is remarkably important in matters of bankruptcy." *California Airmotive Corp. v. Bass*, 354 F.2d 453, 455 (9th Cir. 1965). The effective and expeditious disposition of disputes such as the ones here at issue will be greatly furthered if courts honor settlements such as the one challenged by this motion. The motion to reopen the bankruptcy proceedings involving the Shens is accordingly DENIED.

III

Paragraph 7 of the release here at issue provides that the releasing parties shall pay any and all attorneys' fees incurred by the released parties resulting from any attempt to set the release aside. Thus, as a matter of contractual right, this Court awards attorneys' fees in favor of Mr. Graham and the firm of Luce, Forward, Hamilton and Scripps to be paid by Mr. and Mrs. Shen.

In addition, this Court finds Mr. Kaye jointly liable for those same attorneys' fees under the inherent power of this Court, recently reaffirmed by the United States Supreme Court in *Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836 (June 23, 1980). Although the "American rule" is that generally a prevailing party is not entitled to recovery of attorney's fees, *Arcambel v. Wiseman*, 1 U.S. (3 Dall.) 306 (1796), federal courts retain the inherent power to tax counsel fees against a party who has willfully and in bad faith abused judicial processes. *Roadway, supra*, 48 U.S.L.W. at 4840. The instant motion to reopen is an example of such willful and bad faith abuse.

On July 5, 1978, during the course of an examination of Mr. Shen pursuant to Rule 205, Mr. Kaye made the following statement:

> "MR. KAYE: LET ME EXPRESS ON THE RECORD OUR HUGE AND UNLIMITED ADMIRATION FOR THE IRONCLAD LANGUAGE DESIGNED BY MR. BROWN IN THIS PROPOSED APPLICATION FOR STIPULATED ORDER. IT

COVERS MUCH MORE--WELL, FOR THE PURPOSE THAT MR. BROWN IS OFFERING IT, IT SIMPLY PROTECTS THE TRUSTEE. IT COVERS MUCH MORE THAN WE THINK IS NEEDED ON BEHALF OF THE TRUSTEE OR OTHER PARTIES THAT THE TRUSTEE HAS SOUGHT TO PROTECT BY THE ORDER. ONE OF THE MOST OBJECTIONABLE FEATURES OF THE PROPOSED STIPULATED ORDER APPEARS IN PARAGRAPH 3 OF THE STIPULATION ON PAGE 4 BEGINNING LINES 10 THROUGH LINE 17. WE HAVE HERE A GENERAL RELEASE AND ALSO A WAIVER OF THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542. NOW, THAT PROVISION OF THE CALIFORNIA CIVIL CODE WOULD PROVIDE THAT ANY GENERAL RELIEF THAT WE MAKE WOULDN'T EXTEND TO CLAIMS WHICH WE MIGHT HAVE THAT WE'RE UNAWARE OF AT THE PRESENT TIME AND WHICH IF WE HAD BEEN AWARE OF, IT WOULD HAVE MATERIALLY AFFECTED OUR SETTLEMENT.

• • • • •

• • • AND IF WE SHOULD LATER DISCOVER A MAJOR DISCREPANCY, WE WOULD BE BARRED BY THIS WAIVER, BY THIS VERY BROAD, GENERAL RELEASE FROM EVER OBTAINING A RECOVERY ON SOMETHING--IN EFFECT WE ARE BEING ASKED TO SIGN AWAY IN THE BLIND ANY CLAIMS WHICH WE MAY HAVE.

• • • • •

MR. KAYE: WELL, THIS EXHIBIT 1 IS--COVERS EVERY CONCEIVABLE POSSIBILITY UNDER THE SUN, AND RUNS FAR BEYOND ANY PROTECTION THAT MAY BE REQUIRED BY THE TRUSTEE." R.T. 5-7.

Thus, Mr. Kaye demonstrated his awareness that the release challenged through the motion here under consideration had the legal effect of barring "every conceivable possibility under the sun." Nonetheless, he proceeded to challenge the release on the basis of a number of issues which had already been contested by both sides prior to the execution of the release.

This awareness on Mr. Kaye's part of the legal effect of the release, coupled with several other facts, leads this Court inexorably to the conclusion that the present motion to reopen was made vexatiously, unreasonably, in bad faith and was willfully abusive. First, the Shens offered almost nothing in the way of factual support of their challenge to the release which had not been brought to light prior to the settlement and release. Second, their legal arguments on the invalidity of the release were manifestly transparent in their lack of merit. Their usurpation of counsel theory was particularly vacuous. Third, as Mr. Kaye's affidavit and statements at the hearing make evident, his motivation in bringing this action was to rectify what he saw as errors of judgment, on both his and the Shens' part, in negotiating the release. It is not a legitimate ground for challenging a release and settlement that a better deal could have been, or should have been negotiated by a party or his attorney. Fourth, there was a marked chasm between the charges of crime and corruption leveled by Mr. Kaye, who injected them with a great deal of vituperative rhetoric, and the facts offered in support of those charges. Finally, this Court finds it disturbing whenever an officer of this Court seeks to repudiate a signature to a document made in open court.

In addition, pursuant to 18 U.S.C. § 1927, this Court assesses the costs of this motion against attorney Kaye. That statute provides:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

In these days of crowded dockets and increasing caseloads, the time of federal courts is an ever more precious resource, which this Court will not tolerate having squandered in pursuit of manifestly unmeritorious motions. Such motions contribute to the glacial pace of modern litigation, which as the Supreme Court has recently emphasized, breeds frustration with the federal courts, and ultimately disrespect for the law.

In assessing the amount of attorneys' fees to be awarded as reasonable compensation for the work performed in responding to the Shens' motion to reopen, this Court has been guided by the criteria outlined in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). In particular, the computation was based on the time and labor required to organize, review, and present the massive amount of material involved in the Shens' charges, 324 hours by the Luce, Forward firm and an additional 39.5 hours by the Seltzer, Caplan firm, and a reasonable hourly billing rate, averaging approximately $85 an hour for the Luce, Forward firm, $150 an hour for Mr. McMahon's 26.5 hours as the attorney of record, and $35-$40 an hour for 13 hours of law clerk research. Also specifically considered were the time limits imposed for organizing, reviewing, and presenting voluminous materials dealing with the Shens' estate, the high quality of the work performed by respondents' counsel, their success in defeating the motion to reopen, the experience, reputation, and ability of respondents' counsel, and the acrimonious nature of the task of dealing with the Shens and Mr. Kaye.

Accordingly, IT IS HEREBY ORDERED that the motion to reopen bankruptcy proceedings is DENIED, and that attorneys' fees in the amount of $31,883 and costs in the amount of $4,456.29 are assessed jointly and severally against Mr. and Mrs. Shen and Mr. Michael Kaye to be paid within thirty (30) days.

Dated: September 10, 1980.

William H. Orrick
United States District Judge

FOOTNOTES

1. Rule of Professional Conduct of the State Bar of California 2-110 states:

> "A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall the member do so if the members knows or should know that the person solicited for or offering the employment wishes to accomplish any of the following objectives:
>
> (A) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise take steps, solely for the purpose of harassing or maliciously injuring any person or to prosecute or defend a case solely out of spite.
>
> (B) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification or reversal of existing law.
>
> (C) Take or prosecute an appeal solely for delay, or for any other reason not in good faith."

2. This Court recommends pursuant to Local Rule 110-6 that the Standing Committee on Discipline review Mr. Kaye's qualifications to remain a member of the Bar of this Court.

3. On April 18, 1979, before the Honorable Herbert Katz, Mr. Kaye stated: "Mr. Shen's decision is made and I believe it will stand and I am not going to come back to unmake it." Transcript of the afternoon session, April 18, 1979, p. 10.

4. *See, e.g.*, letters dated March 8, 1979, and March 14, 1979, from the Luce, Forward firm to Mr. Kaye.

5. The Trustee filed his motion to determine the responsibility and liability issues on August 7, 1978, just weeks after the issues were raised during the Rule 205 examination.

FILED

FEB 4 1981

RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

2-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of SAMUEL T. H. SHEN, and CAROLYN JEAN SHEN,
Debtors.

No. 80-5784

MICHAEL KAYE,

Appellant,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS: and THEODORE W. GRAHAM,

Appellees.

BK # 74-607K
BK # 74-608

ORDER

Before: TANG and CANBY, Circuit Judges

Upon due consideration, the court enters the following order:

1. Appellant's motion for an extension of time to respond to appellee's motion to dismiss this appeal is granted, and the opposition heretofore received is ordered filed;

2. Appellees' motion to dismiss this appeal as moot is denied;

3. The certificate of record, heretofore received, is ordered filed; and

4. Appellant shall file his opening brief on or before forty (40) days from the entry of this order.

Mo Cal 1/26/81*

FILED
OCT 5 1981
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

3-1

FILED
OCT 29 1981
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

DOCKETED
Marilyn Rolls
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In the Matter of	
SAMUEL T. H. SHEN and CAROLYN JEAN SHEN,	Bankruptcy Nos. 74-607-K 74-608-K
Debtors.	MEMORANDUM AND ORDER

Heretofore this Court denied a motion of Mr. and Mrs. Samuel T. Shen, ex-debtors, and their attorney, Mr. Michael Kaye, to reopen bankruptcy proceedings in order to charge the trustee in bankruptcy, Mr. Theodore Graham, and his counsel, Luce, Forward, Hamilton and Scripps, with misconduct on the grounds that a duly executed, valid release acted as a bar to reopening the bankruptcy proceedings. This Court further found that the motion was "an unreasonable and vexatious multiplication of the Shen's bankruptcy proceedings," promulgated by bad-faith motives and thereupon imposed joint and several liability upon Mr. Kaye and the Shens for costs and attorney's fees in the amount of $36,339.29. Mr. Kaye, *in propria persona*, appealed this Court's judgment to the Ninth Circuit Court of Appeals. The Shens and appellees, Mr. Graham and Luce, Forward, Hamilton and Scripps, entered into a settlement of this Court's judgment on September 16, 1980, with full satisfaction of the judgment taking place on November 11,

1980. Appellees' motion to dismiss the appeal as moot was denied by the Court of Appeals. Appellees now move to require appellant to file a cost bond of $15,000 pursuant to Rule 7 of the Federal Rules of Appellate Procedure. Initially appellees requested a cost bond of $25,000, including $20,000 for anticipated attorney's fees and $5,000 for costs. Later appellees amended the figure downward to $15,000, giving no breakdown as to what portion of the bond would cover attorney's fees and what portion would cover costs.

Rule 7 provides:

> "The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case."

Prior to the 1979 Amendment, Rule 7 required the filing of a $250 bond, allowing the court to increase the amount upon a proper motion by appellee. The 1979 Amendment, as reflected by the *Advisory Committee Note*, dispensed with the requirement of a $250 bond, leaving the imposition of an appeal bond to the discretion of the district court. The decision to delete the $250 filing requirement was made upon the presumption that "[t]oday it bears no relationship to actual costs." *Advisory Committee Note*, 1979 Amendment to Rule 7. Nowhere in the prior rules, the amended Rule 7 or in any of the case law is mention made of including attorney's fees as part of the costs contemplated by Rule 7. Rather, Rule 7 applies only to those routine taxable costs authorized by 28 U.S.C. § 1920 and Rule 39 of the Federal Rules of Appellate Procedure. 9 *Moore's Federal Practice* par. 207.06 at 7-10.

Therefore, the costs of appeal contemplated by Rule 7 are: the docket fee, 28 U.S.C. § 1921; costs of briefs, appendices, and copies of records, Rule 39(c); and preparation and transmission of the record and the cost of the reporter's transcript if necessary, Rule 39(e). Appellees originally stated that a reasonable dollar figure for their costs, as enumerated above, is $5,000. Therefore,

IT IS HEREBY ORDERED that appellees' motion to require appellant, Michael Kaye, to file a cost bond to ensure payment of costs on appeal is GRANTED; provided, however, the amount of the cost bond shall be $5,000 instead of $15,000.

Dated: October 5, 1981.

William H. Orrick
United States District Judge

FILED

JAN 18 1982

CLERK, U.S. COURT OF APPEALS

4-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
SAMUEL T.H. SHEN and
CAROLYN JEAN SHEN,

Debtors.

MICHAEL KAYE,

Appellant,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS; AND THEODORE W. GRAHAM,

Appellees.

No. 80-5784

Bankruptcy Nos. 74-607-K
74-608-K

ORDER

Appeal from the United States District Court
for the Southern District of California

William H. Orrick, District Judge, Presiding

Argued and Submitted January 5, 1982

Before: CHOY, GOODWIN, and FARRIS, Circuit Judges

The appeal is dismissed for the refusal of Appellant Michael Kaye to post the cost bond fixed by the district court pursuant to Rule 7, Fed. R. App. P., by order filed October 5, 1981, and for the failure of the Appellant to file within a reasonable time thereafter a motion for relief or

for reduction of the amount of the bond by showing his inability to comply with the court's order.

The panel of this court before which this appeal was set for hearing on January 5, 1982, is advised that Appellant filed a motion regarding this matter in the Clerk's Office in San Francisco on January 4, 1982. When the panel receives copies of that motion, it will consider it, and if it decides to amend this order, it will do so within seven (7) days from the date this order is filed.

FILED

FEB 24 1982

CLERK, U.S. COURT OF APPEALS

5-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF
SAMUEL T.H. SHEN and
CAROLYN JEAN SHEN,

Debtors.

MICHAEL KAYE,

Appellant,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS: AND THEODORE W. GRAHAM,

Appellees.

No. 80-5784

Bankruptcy Nos. 74-607-K
74-608-K

ORDER

Before: CHOY, GOODWIN and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.